

Guidance on the Imposition of Civil Penalties for Violations of EPCA Conservation Standards and Certification Obligations

The U.S. Department of Energy (Department or DOE) issues this guidance on civil penalties for violations of the Department's energy and water conservation standards and requirements.¹ In this Guidance, we (1) provide background on DOE's penalty authority; (2) explain our penalty policy; and (3) set forth our basic approach to the imposition of penalties for violations of DOE's standards and certification requirements.

I. Background

The Energy Policy and Conservation Act of 1975, as amended, (EPCA or the Act) authorizes the Department to enforce compliance with the energy and water conservation standards established for certain consumer products and commercial equipment. 42 U.S.C. §§ 6299-6305 (consumer products), 6316 (commercial and industrial equipment). To ensure that all covered products distributed in the United States comply with DOE's energy conservation standards, the Department has promulgated enforcement regulations, which include specific requirements to certify compliance with those standards. *See* 10 C.F.R. Part 430, Subpart F; 10 CFR Part 431, Subparts B, K, S, T, U, and V.

Section 333 of EPCA, 42 U.S.C. § 6303(a), authorizes the Department to assess civil penalties for knowing violations of certain prohibited acts. *See* 42 U.S.C. §§ 6302(a)(2)-(6); 10 C.F.R. § 430.61(b). For purposes of assessing the penalty, EPCA defines "knowingly as (1) the having of actual knowledge, or (2) the presumed having of knowledge deemed to be possessed by a reasonable man who acts in the circumstances, including knowledge obtainable upon the

¹ The procedures set forth in this document are intended solely as guidance. They are not intended, and cannot be relied on, to create rights, substantive or procedural, enforceable by any party. The Department reserves its right to act at variance with this guidance and to change it at any time without public notice.

exercise of due care.” 42 U.S.C. § 6303(b). The maximum civil penalty, adjusted for inflation, is currently set at \$200 per violation. 10 C.F.R. § 430.61(b).

II. DOE Policy for Civil Penalty Assessment

In assessing penalties under EPCA, the Department’s goals are threefold: (1) to deter future violations; (2) to ensure consistency and equity in the assessment of penalties; and (3) to encourage complete and timely resolution of any instances of non-compliance.

First, to provide deterrence, the Department’s enforcement penalties are designed and intended to penalize violations sufficiently to prevent repeat violations by the same party and to deter violations by other parties. Second, the Department seeks to ensure consistency in penalty assessments while taking into account the legitimate differences among EPCA violations, including the impact of the violation on EPCA’s regulatory framework and on the public. Third, and finally, the Department seeks to achieve timely resolution of violations, taking into consideration the specific mitigating and aggravating circumstances of individual violations and bringing violators into full compliance with EPCA’s requirements as expeditiously as possible. In doing so, we look to a number of factors, including, but not limited to, the following: the nature and scope of the violation; the provision violated; the violator’s history of compliance or non-compliance; whether the violator is a small business; the violator’s ability to pay; the violators’ timely self-reporting of the violation; and the violator’s self-initiated corrective action, if any.

III. Penalty Assessments for Standards and Certification Violations.

Below we set forth the Department's basic approach to penalty assessments for two of the acts prohibited by EPCA: (1) failure to comply with applicable EPCA standards; and (2) failure to comply with standards certification requirements.

A. Penalty for Violating EPCA Standards

EPCA authorizes the Department to assess penalties against any manufacturer or private labeler for knowingly distributing in commerce covered products or equipment that do not conform to applicable EPCA conservation standards. *See* 42 U.S.C. § 6303(a). Compliance with energy and water conservation standards is at the core of EPCA's regulatory framework and, more broadly, the Department's mission. Thus, the Department recently has ramped up enforcement of these standards to ensure that covered consumer products and commercial equipment meet the nation's conservation standards, which will save money for consumers, reduce greenhouse gas emissions, and ensure a level playing field in the marketplace.

Pursuant to EPCA, penalties for standards violations are assessed for each unit of a non-compliant model that a manufacturer or private labeler has distributed in commerce. 42 U.S.C. § 6303(a). EPCA defines "distribute in commerce" as "to sell in commerce, to import, to introduce or deliver for introduction into commerce, or to hold for sale or distribution after introduction into commerce." 42 U.S.C. § 6291(16). DOE interprets this to include all units sold as well as all units held out as available for sale.

The Department will seek the maximum civil penalty against manufacturers and labelers that knowingly distribute products that violate the federal energy and water conservation standards – \$200 per unit distributed in commerce. We believe the maximum penalty is appropriate and necessary to provide the greatest possible deterrence. Such violations directly

undermine the EPCA regulatory regime, preventing consumers from achieving energy and cost savings intended by the program. To ensure the fair and reasonable application of penalties, we will take into account the specific circumstances of particular violations, including the size of the violator, the extent of deviation from the EPCA requirements, the technical reason, if any, for the noncompliance, a violator's history of compliance or non-compliance, a violator's ability to pay, self-reporting of violations and corrective actions taken. Finally, the Department may adjust penalties as appropriate to encourage the prompt and comprehensive resolution of cases.

B. Penalty for Violating Certification Requirements

EPCA also authorizes the Department to assess penalties against any manufacturer that fails "to make reports or provide other information required to be supplied" under EPCA. 42 U.S.C. § 6302(a)(3); 10 CFR § 430.61(a)(1). The Department's implementing regulations require that, before distributing models in commerce, manufacturers must file certification reports and compliance statements with the Department stating that each basic model meets the federal energy and water conservation standards. These reporting requirements provide the Department with information necessary for it to ensure that American consumers are buying products that deliver the required energy or water savings and cost savings in accord with EPCA regulations.

Accordingly, last year, the Department announced and implemented a program for the tougher enforcement of existing conservation standards reporting requirements. On October 14, 2009, the Department issued guidance making clear that, under existing DOE regulations, a manufacturer's failure properly to certify a covered product and retain records in accordance with DOE regulations may be subject to enforcement action, including the assessment of civil penalties. *See* Guidance on Energy-Efficiency Enforcement Regulations, 74 Fed. Reg. at 52,793-

95. In recognition that the market may not have anticipated DOE's guidance and given that some manufacturers previously have been given, on an ad hoc basis, a thirty-day grace period to cure defective certifications, DOE issued a notice in the Federal Register staying enforcement of the certification requirements at 10 CFR § 430.62 for thirty (30) days, allowing manufacturers to come into compliance without penalty. *See* Grace Period From Enforcement of Energy-Efficiency Certification for Residential Products, 74 Fed. Reg. 65,105-06 (Dec. 9, 2009). That grace period expired on January 8, 2010.

Since that date, the Department has begun a close review of certification filings, followed up on non-compliance, and initiated civil penalty enforcement proceedings as appropriate. The Department is committed to systematic and rigorous enforcement of these requirements to ensure that all products sold in the United States are properly certified as compliant with its standards.

The Department has determined that, in general, basic penalties for failure to comply with the certification requirements should be set below the statutory maximum. Although, DOE's reporting requirements are crucial to EPCA's regulatory framework, this reduction in the maximum penalty reflects that certification violations themselves do not necessarily mean that the product itself consumes more energy or water than permitted by law. To ensure a rational penalty structure, therefore, we believe it is generally appropriate to distinguish penalties for certification violations from substantive violations. Where the Department lacks specific information as to the number of days a product has been distributed in commerce without proper certification, we will adopt a rebuttable presumption of one year. Violators who demonstrate a shorter duration of their specific violation will, in general, be assessed a reduced penalty. Thus, subject to our right to make a different assessment based on circumstances, DOE establishes a

penalty of \$7,300 per basic model – ten percent of the \$200 maximum penalty (\$20 per day) per model for one year.

The Department's regulations require manufacturers to submit a certification report for each basic model and a compliance statement before distributing the model in commerce. Therefore, the Department will calculate the penalty based on each day a manufacturer distributes each basic model in commerce in the U.S. without having submitted a certification report and will calculate an additional penalty calculated per day for failure to submit a compliance statement. We recognize, however, that as the number of models at issue becomes large the incremental increase in penalty may become disproportionate to the additional, incremental harm from the failure to properly certify each additional model. In such circumstances, we believe that a linear increase in the penalty according to the number of models at issue may become a poor proxy for the gravity of the violation and its impact on EPCA's regulatory framework. To account for this, we have adopted a penalty structure that decreases in amount as the number of models increase up to a maximum cap. Specifically, subject to our right to make a different assessment based on circumstances, for the first thirty models, we will assess the basic penalty; for the next twenty models, we will assess one-half the basic penalty; and for the remaining models we will assess one third the basic penalty up to a cap of \$500,000 (which may be exceeded in aggravating circumstances).

Consistent with the policies outlined above, the Department will take into account the specific circumstances of a violation to ensure a fair application of penalties. As above, we will look to factors, including, but not necessarily limited to, the following: the size of the violator, demonstrated inability to pay, the extent of deviation from the EPCA requirements, self-reporting of a violation and a violator's history of compliance or non-compliance.

The Department may adjust penalties, as appropriate, to encourage complete and timely resolution of violations. However, full compliance with all applicable certification requirements will be precondition to any such resolution.